United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4011, 75-4044

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES K. STERRITT, INC. &
CONCRETE HAULERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the Board properly asserted jurisdiction over the Company.

2. Whether substantial evidence on the whole record supports the Board's finding that the Company violated Section 8(a)(1) of the Act

by urging employees to bypass the Union, by bargaining directly with employees and by threatening loss of employment because of their Union activities.

3. Whether substantial evidence on the whole record supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging seven employees because they had engaged in protected union activity.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of James K. Sterritt, Inc. and Concrete Haulers, Inc. (hereafter, "JKS" and "CHI", respectively, or collectively, "the Company") to review a decision and order of the National Labor Relations Board issued on December 16, 1974 pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The Board has filed a cross-application requesting enforcement of its order. The Board's Decision and Order are reported at 215 NLRB No. 143 (AI. 20-41).[1] The Court has jurisdiction, the unfair labor practices having occurred at New Baltimore, New York.

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by urging and encouraging its employees to bypass the Union[2]

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[1] "A" references are to the portions of the record printed as the Appendix. "AI" references are to the first volume of the Appendix containing the Board's findings; "AII" and "AIII" references are respectively to the volumes containing the complete transcript of the hearing before the Board herein, and the exhibits.

[2] Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

and establish their own union; by bargaining directly with its employees rather than with the Union; and by telling employees that their Union activities would put employees out of work. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by failing and refusing to recall employees from layoff because they had engaged in protected Union activity (AI. 21, 37). The facts upon which the Board relied are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's activities in interstate commerce

For a number of years, Sterritt has operated a truck leasing concern in New York and other Northeastern states. Sterritt's business was initially incorporated as "James K. Sterritt, Inc." ("JKS") of which he was president. Sterritt also controls and is president of Sterritt Trucking, Inc., ("STI") which, for reasons not directly related to this proceeding, was organized to hold operating authorities issued by the Interstate Commerce Commission and New York State Commerce Commission permitting operation as a carrier in commerce (AI. 23; AII. 151-152). As the carrier officially granted permission to operate commercially, STI contracts with Span Crete Northeast, Inc., a division of Penn-Dixie, Inc., (hereafter "Span-Crete"), to transport precast and prestressed concrete products (AI. 23; AII. 56). However, until February 1974, the transportation of those products was actually performed by JKS, operating under the authorities nominally held by STI (AI. 2; AII. 151). In the twelve month period prior to January 31, 1974, STI and JKS together performed services for Span-Crete valued in excess of $50,000. Span-Crete in turn annually shipped goods valued in excess of $50,000 directly from New York

State to other states in the United States (AI. 23-24; AII. 19-20). Payments by Span-Crete were made to STI which in turn made payments to JKS (AI. 24; AII. 58).

B. Some of the Company's employees strike to win employer recognition of the Union as their representative; President Sterritt promises eventual discharge of the strikers.

In April 1973[3] JKS owned a fleet of trailer-trucks and employed approximately 17 drivers (AI. 25; AIII. 17). In that month, twelve drivers signed authorizations designating the Union as their collective bargaining representative (AI. 25; AII. 23-24). On April 11, the Union demanded recognition of Sterritt as such (AI. 25; AII. 589). Sterritt did not respond, and at approximately 11:00 p.m. on May 6, Union representative William Mackey informed him that the Company drivers would strike that night at midnight because of Sterritt's failure to recognize the Union (AI. 25; AII. 590). Sterritt replied that he intended to recognize the Union and agreed to meet with Mackey and the drivers at the Company terminal at midnight (AI. 25; AII. 591).

When Sterritt reached the terminal he found drivers Robert Quick, Monteverde, Misetich, Rippinger, Walter Peters, Sr. and Jr. and mechanic Thomas Clark prepared to picket (AI. 25; 219). Sterritt met with Mackey and agreed to recognize the Union (AI. 25; AII. 219, 592). Upon learning that Sterritt had agreed to recognize the Union the drivers and mechanic went home without striking, intending to return to work in the morning (*ibid.*).

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[3] Unless stated otherwise, all dates hereafter are 1973.

Shortly after the men left the terminal, Sterritt, angered that he had been aroused so late, immediately sent out several truckloads which had been previously scheduled to go out the following morning in trucks driven by the Company drivers (AI. 25; AII. 592, 645-646). These trucks were driven by unidentified persons other than the men who had been prepared to picket the night of May 6 (*ibid.*). When driver Robert Quick returned to the terminal on the morning of May 7, his load, which had been at the terminal the night before, was gone (AI. 25; AII. 220). When driver Paul Overbaugh arrived at the terminal he heard Sterritt tell another driver that "no goddamn bums" were "going to tell him [Sterritt] how to run his business." Sterritt also said that if the men who had intended to picket the night before "wanted a union contract, you won't work until the Union contract [is] signed" (AI. 25; AII. 411). Sterritt then told Overbaugh that he could go to work because he hadn't "been on the picket line at midnight" (*ibid.*). After consulting the Union, drivers Quick, Allen Finch, Edward Jordan, Jr., Thomas Monteverde, Paul Overbaugh, Albert Quick, Sr. (Robert Quick's father), Frank Ruhnke, and other drivers ceased working and established a picket line at the Company terminal (AI. 25; AII. 220, 312, 348, 378, 412, 437, 464-465). During this strike approximately eight other drivers crossed the picket line and continued working (AI. 25; AII. 76, 81, 83-84, 88-92, 223). On May 8, Sterritt approached driver Edward Jordan (who had not been at the terminal at midnight on May 6) while the latter was picketing and informed him that the men who were at the "terminal the night of the strike . . . would never work for him again" (AI. 25; AII. 349-350).

C. The Union negotiates retroactive pay for the drivers; Sterritt responds by attempting to establish a Company union.

At the end of 5 days of strike, Sterritt signed a statement recognizing the Union as his employees' collective bargaining representative and agreeing to meet and bargain with the Union (AI. 25; AII. 33; AIII. 3). Thereafter, and until November, the Company negotiated for a contract with Union representatives (AI. 26; AII. 36). In the course of negotiations, Sterritt orally agreed to make any negotiated wage increases retroactive for his employees employed before August 1 (AI. 26; AII. 36, 38).

In early September Company employees Thomas Monteverde and Edward Jordan, Jr., were conversing with Frank Rippinger, another employee, while waiting for dispatch from the terminal (AI. 34; AII. 350-351). Sterritt summoned Rippinger into his office, and when Rippinger emerged after an hour in Sterritt's office, he asked the other drivers what they thought "about a Company union" (AI. 34; AII. 351). Jordan told Rippinger that he did not "think too much" of the idea. Rippinger explained that Sterritt had discussed the possibility of a Company union while they were in the office (*ibid.*). Rippinger told Monteverde that there would be a meeting that night and asked him to attend (AI. 34; AII. 381). Monteverde agreed to come if he returned to the terminal in time (*ibid.*).

That day a notice was posted near the terminal dispatcher's office summoning the drivers to a meeting that evening (AI. 34; AII. 468). A meeting was held that night, attended by all the drivers except Jordan and Monteverde, who were still on the road (*ibid.*). Sterritt was also present. Rippinger announced that he and Sterritt had been "discussing the

possibility of a Company union" (AI. 34; AII. 469). Although several drivers opposed the idea, Sterritt indicated that he thought he could "get a better deal" with a Company union for insurance and other employee benefits and that "it wouldn't cost as much as it would with Local 294" (*ibid.*). The meeting ended with no action being taken. When Monteverde and Jordan returned to the terminal after the meeting ended, Rippinger approached them and told them that the men were angry with him because of the meeting, but that it was Sterritt's idea and not his (AI. 34; AII. 353). On a later occasion Rippinger told Monteverde that that would be the last time he would stick his neck out for the men and that Sterritt had gotten him into his "predicament" with the other drivers (AI. 34; AII. 382-383).

D. Sterritt locks out his employees during negotiations.

About September 14, Company driver Robert Quick asked Sterritt how the Local 294 negotiations were going and said that he had heard that the Company was going to close down on the coming Friday (AI. 26; AII. 227). Sterritt replied that the negotiations were not going well and that "we're going to close the place down until we get the goddamn contract settled, straightened out" (*ibid.*). The following Monday, Tuesday and part of Wednesday, September 17-19, none of the Company employees were dispatched to jobs (AI. 26; AII. 101). On those days all of the work regularly performed by Company employees was contracted to Dallas and Mavis, another trucking firm (AI. 26; AII. 102).

E. Sterritt attempts to persuade his older employees to renounce their claim to the retroactive pay; seven employees refuse to give up the money.

After the Dallas-Mavis incident, Sterritt participated in Union negotiations chiefly through officers of Span-Crete (AI. 26; A. 45-50). On November 19, the Union submitted a contract, reflecting negotiated terms, to Sterritt (AI. 26; AII. 34-35, 229, 611-612; AIII. 15). The proposed contract provided, *inter alia*, that "[a]ll employees on the payroll prior to August 2, 1973, shall receive $160.00 backpay tax free" (AI. 26; AII. 607-608; AIII. 50). Sterritt struck the sentence, and returned the proposal (*ibid.*) A few days later, however, he and representatives of Span-Crete drafted "proposed changes" in the contract. One such change referred to the backpay provision of the contract and stated "Delete — Backpay clause should be deleted and remain a verbal understanding between the parties" (AI. 26; AII. 610-611; AIII. 54). About November 25, Union Business Agent Nick Robillotto informed a representative of Span-Crete that the Union also wanted compensation for the eight senior Company drivers who had lost work due to the Dallas-Mavis incident (AI. 26; AII. 605; AIII. 40).

Because Span-Crete had been instrumental in arranging the contract terms including raises, Sterritt demanded and obtained an immediate 10 percent "tariff", or rate increase, from Span-Crete President Blosser, and an additional 2-1/2 percent increase, effective in January 1974 (AI. 26; AII. 113-114, 620). Beginning November 26, Sterritt also changed the wage structure to that contained in the new contract and began making contributions to the health and welfare and pension funds (AI. 26; AII. 103).

During negotiations, the Union had informed the drivers that present employees who had worked for the Company prior to August would each receive $160.00 retroactive pay as earlier agreed by Sterritt (AI. 26; AII. 233). The Union also announced that employees would be entitled to compensation for work lost during the Dallas-Mavis incident, but that it would be paid by Span-Crete indirectly through JKS (AI. 26; AII. 271). Before the contract was eventually signed, Sterritt asked driver Robert Quick if he would consider waiving his right to the $160.00. Quick replied that he would consider it "if it would help get the Union contract straightened out" (AI. 26; AII. 234). Quick agreed to meet with the other drivers and get their opinions on Sterritt's proposal (*ibid.*). Quick met with all the eligible drivers and they decided that they were entitled to the money and would accept it (AI. 26; AII. 235). Quick reported to Sterritt the names of the drivers and whether they would accept the money (AI. 26; AII. 235-236). On November 26, Span-Crete President Blosser insisted that Sterritt pay the $160 or suffer the loss of Span-Crete's hauling business (AI. 27; AII 620-621). Sterritt instructed his secretary to prepare checks both for the employees entitled to the $160 retroactive pay and also for those seven or eight who were entitled to reimbursement for the Dallas-Mavis incident (AI. 27; AII. 194).

About December 7, driver Monteverde looked for his regular paycheck in the drivers' room where he usually picked it up, but he could not find it (AI. 27; AII. 384). Monteverde went to Sterritt's office and inquired about his check and about the $160 he was entitled to (AI. 27; AII. 385). Sterritt told him that the money "was coming out of his pocket" and not from Span-Crete "like your Union told you." Sterritt continued, however,

that Monteverde would be paid the $160 if he still wanted it (AI. 27; AII. 385). Monteverde requested and was paid the money (AI. 27; AII. 386). About the same time, Sterritt spoke with Ruhnke, Finch, Overbaugh and Robert Quick and told them that the money was coming out of his own pocket rather than Span-Crete (AI. 27; AII. 237). He also said that the payments were "really going to put me in a bind and I want you to know it's my own sweat and blood that I'm paying out" (*ibid.*). Sterritt informed the drivers that the money was in his office and that each driver would have to come in and sign for it (*ibid.*). The four drivers decided they wanted the money and Quick led the way into Sterritt's office, where he announced that the drivers wanted the money and signed for his check (AI. 27; AII. 237-238). Each of the other three drivers also signed for and accepted the payments (AI. 27; AII. 318, 417-418, 474). Thereafter, drivers Edward Jordan, Jr. and Frank Rippinger each accepted checks for $160 and for $80 (for the Dallas-Mavis incident) and Albert Quick, Sr. (Robert Quick's father) accepted a check for $80 (AI. 27; AII. 354, 438). Driver Peter Whipper declined to accept two checks prepared for him (AI. 27; AII. 583-584). No checks were issued to driver Bruce Meo (AI. 27; AII. 117). Accordingly, only Finch, A. Quick, Sr., Ruhnke, Monteverde, R. Quick, Jordan, Overbaugh and Rippinger accepted checks.

F. Sterritt lays off his employees and discharges the seven remaining employees who accepted checks; he undertakes to change the name of the Company from JKS to CHI in order to avoid the terms of his contract with the Union, and to provide a device to cloak his discharge of the employees; the Company bargains individually with its remaining employees.

In early December, Sterritt received a letter from Span-Crete President Blosser complaining that the tariff increases negotiated between the Company

and Span-Crete were "jeopardizing your position with our Company" and urging Sterritt to "make every effort possible at a reduction to your existing tariff" (AI. 27; AIII. 24). In response Sterritt implemented the organization of "Concrete Haulers, Inc." (hereafter "CHI") to replace JKS, explaining to Blosser that the high tariffs were the result of "exorbitant charges for various benefits" under the Union contract and the Company was "pursuing organizational changes" in hope of "providing for a future rate adjustment" (AI. 27; AIII. 29). At this time employment applications were printed for CHI and the necessary paperwork to incorporate CHI was initiated (AI. 27-28; AII. 538; AIII. 31-34).

On December 14, Sterritt informed his secretary and bookkeeper, Michalina Roberts, that he was going out of business and would no longer need her services (AI. 28; AII. 195). About the same time, Sterritt told drivers Overbaugh and Finch, Sr. that he "could not live with a Union contract" (AI. 28; AII. 419). On the following Monday Sterritt had Roberts prepare and post a notice informing the drivers that JKS was "going out of business" and that all drivers were terminated as of January 31, 1974 (AI. 28; AII. 196). The notice made no reference to CHI (AI. 28; AII. 120). Robert Quick read the notice and informed Robillotto, who, although uncertain of the notice's meaning, advised him to wait until January 31 to "see what happens" (AI. 28; AII. 262). Quick also asked Sterritt whether the notice was correct. Sterritt replied that it was and told Quick that "whether you guys know it or not, when you accpeted the $160 it was the turning point in the job" (AI. 28; AII. 239). Quick asked that, since Sterritt was going out of business, whether he could work one of the Company trucks if he could find work for it. Sterritt replied, "No, I think it's

time you and I split company" (*ibid.*). Quick asked Sterritt who was going to haul for Span-Crete after the Company went out of business on January 31. Sterritt answered that he "didn't know and didn't care" (*ibid.*). Sterritt later explained to Quick that Quick's Union activities "sure put a lot of people out of work" (AI. 4; AII. 240). Driver Monteverde, after reading the notice in December, reasoned that since JKS was "going out of business," Sterritt might have been planning to open "another business or another corporation," and asked Sterritt for an employment application (AI. 28; AII. 387-388). Sterritt got "disturbed" and replied, "you are no longer included in my future plans. There will be no applications to you from this Company or any other company I am ever involved in" (AI. 28; AII. 388). Rippinger quit in December (AI. 28; AII. 80). To Overbaugh, Sterritt compared the expected closing to "getting rid of a disease" (AI. 28; AII. 420).

In late December and in January 1974,[4] the Company laid off all of its truckdriver employees due to a lack of work (AI. 28; AII. 68-70, 544-545, 623; AIII. 17). When driver Allen Finch, one of those who had accepted the payments in November, was laid off, Sterritt suggested that he apply for work with Hudson Valley Cement, another trucking company in the area (AI. 28; AII. 342).

During this time Sterritt prepared to resume hauling Span-Crete products. In late January, Company Terminal Manager Peter Whipper worked on the Company trucks at a terminal in Catskill, New York (AI. 28; AII. 546). He directed the removal of JKS's name from the truck doors and had them repainted with the legend "Concrete Haulers, leased to Sterritt Trucking, Inc." (*ibid.*). By the end of January, at least six trucks were

[4] Unless another year is indicated, all dates hereafter are in 1974.

returned to the Company terminal bearing the CHI name in the place of JKS (AI. 28; AII. 547).

At the same time the trucks were being readied for CHI, Sterritt undertook the recall of the drivers who had not accepted the November checks. In the last week of January, all of the drivers who had not insisted on retroactive pay appeared at Sterritt's office to return to work. On January 24, JKS drivers Walter Wood, Stephen Wood, Peter Decker, Walter Martin, and Richard Alti appeared at Sterritt's terminal office and obtained CHI applications, which they immediately completed and returned to Sterritt (AI. 28-29; AII. 142). On January 28, driver Robert Gerow applied and on January 31 driver Frank Mausolf applied (AI. 29; AII. 143). These drivers and driver Van Heusen were later recalled to work on February 1 (AI. 29). Between January 24 and 31, driver Frank Ruhnke, one of the eight drivers who accepted the November 1973 payments, spoke to Sterritt in the terminal dispatcher's office. Ruhnke asked, "Since you're not going to haul Span-Crete any more, who is?" (AI. 29; AII. 475). Sterritt replied, "I don't know and I don't care. If you want to find out, you'll have to find out from Span-Crete" (*ibid.*). None of the seven former JKS drivers were given applications (and the eighth, Rippinger, had previously resigned).

Shortly thereafter Sterritt met with the drivers who were to work for CHI and reached agreement with them on the wages, hours and other conditions under which they would work (AI. 29; AII. 125-126). The "agreement" called for a wage of $5.25 per hour plus 15 cents a mile compared to the $6.00 per hour paid under the Union contract (AI. 29; AII. 125-126; AIII. 13). On about February 1, CHI began hauling for Span-Crete

with the ten JKS drivers plus five new drivers (AI. 29; AII. 122). None of the seven drivers who had accepted the November payments were recalled from layoff after the Company became CHI. When CHI began operations it reduced Span-Crete's tariff rates by 8 percent (AI. 29; AII. 644).

CHI purchased the JKS trucks and continued to haul preformed concrete products for Span-Crete (AI. 29; AII. 67). Although Sterritt held no office in CHI, he retained control over its operations as general manager and installed the Company accountant, James Bevier as its president. Bevier spent about three days a week at the Company office (AI. 29; AII. 72, 515-516). Sterritt also remained in charge of corporate policy, labor relations, and Company purchasing (AI. 29; AII. 73-74). CHI occupies the same premises in New Baltimore as did JKS (AI. 24; AII. 73, 75). That facility has been and continues to be owned by Sterritt personally (*ibid.*). The Company telephone number was not changed at the time of its February resumption as CHI (*ibid.*).

G. The discharged employees announce their desire to return to work; the Company and Sterritt refuse to reinstate them.

After operations were resumed, Robert Quick, who had been laid off on January 25, observed a Company vehicle operating under the name "Concrete Haulers, Inc." (AI. 29; AII. 241). Quick informed Robillotto that he had observed the truck (AI. 29; AII. 263). As a result of this information, the Union summoned the seven unemployed drivers to a Saturday March 9 meeting at Union headquarters (AI. 30; AII. 243). All

but Overbaugh attended. Also present were Robillotto, his son Michael, business agent "Whitey" Bennett and the drivers then employed by CHI (AI. 30; AII. 41). Robillotto announced that he had received from Sterritt a document containing driver seniority lists for both JKS and CHI, as well as Sterritt's list of the terms negotiated with the CHI drivers (AI. 30; AII. 124; AIII. 17, 30). He also announced that the seven laid off drivers would be called back to work by the Company dispatcher the following Monday in accordance with their former seniority positions at JKS (AI. 30; AII. 246, 326). Robillotto went over the seniority list with the drivers and numbered their positions on the list, thereby reintegrating the laid off drivers into the Company's seniority order.[5] Quick was placed first in seniority (*ibid.*). The five newly hired CHI drivers — *i.e.*, those who had replaced the seven laid off drivers — were placed at the bottom of the list (*ibid.*).

Robillotto then read from Sterritt's list of terms, which Robillotto referred to as a "proposal" (AI. 30; AII. 247). When he read that wages were $5.25 an hour, Robert Quick pointed out that this was only 25 cents more than they were making before the Union came into the picture (*ibid.*). Robillotto changed the $5.25 to $5.50 and the 15 cents to 16 cents per mile (*ibid.*). Robert Quick asked about backpay for those not recalled previously and Robillotto told him that there would be none (AI. 30; AII. 247). Toward the end of the meeting Robillotto called Sterritt by telephone and informed him that everybody was at the meeting and that a new seniority list had been prepared, which merged the laid off drivers

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[5] At the insistence of the laid off drivers, Whipper was dropped from his number 2 position on the list on the ground that he had quit sometime before the CHI operation began (AI. 30; AII. 245-246).

with those working for CHI (AI. 30; AII. 249-250). Robillotto told Sterritt that Robert Quick would be first dispatched as the most senior man (*ibid.*). Robillotto informed Sterritt that the men were "coming directly to your office for a meeting to get things ironed out." All employees then left the Union hall; the six laid off men left for the Company together. En route they stopped for coffee (AI. 30; AII. 251-252). When they later arrived at the Company offices, the cars of the other drivers were already parked and both doors to the terminal offices were locked (AI. 30-31; AII. 252). Although the men observed several people in the office, there was no response when they knocked (AI. 30; AII. 329). The office window curtains, although open when they arrived, were pulled closed and the six returned to their automobiles (AI. 31; AII. 253, 329). After waiting to talk to Sterritt for 15 or 20 minutes, they left when he did not appear outside the locked office (*ibid.*). The men went to a pay telephone, called the office and asked to speak to Sterritt (AI. 31; AII. 254). However, Sterritt did not come to the telephone and after 15 minutes the men went home (*ibid.*). Although Sterritt later called Quick and arranged a meeting with the six former employees for the following afternoon, March 10, Sterritt's wife called Quick and cancelled the meeting on the morning of August 10. The men have never met with Sterritt, nor have they been recalled to work (AI. 31-32; AII. 255).

II. THE BOARD'S CONCLUSION AND ORDER

On these facts, the Board concluded that the Company violated Section 8(a)(1) of the Act by urging and encouraging its employees to bypass the Union and establish their own union; by bargaining directly with

its employees concerning rates of pay, wages, hours of employment and other terms and conditions of employment at a time when the Union was the duly recognized exclusive representative of its employees; and by telling its employees that their union activities would put a lot of employees out of work. Further, the Board found that the Company violated 8(a)(3) and (1) of the Act by failing and refusing to recall seven employees from layoff because of their Union activities. The Board's order requires the Company to cease and desist from these or any like or related unfair labor practices. Affirmatively, the order requires the Company to offer immediate and full reinstatement to the seven discriminatees to their former positions or to substantially equivalent jobs if their former positions no longer exist, to restore their pre-discharge seniority once they are reinstated, and to make them whole for any losses they may have suffered by virtue of the discrimination against them, and to post appropriate notices (AI. 37-40).

ARGUMENT

I. THE BOARD PROPERLY ASSERTED JURISDICTION OVER THE COMPANY.

In ordering the Company to cease and desist from a repetition of its unfair labor practices and to remedy those it has committed, the Board acted under its authority conferred by Section 10(a) of the Act to prevent unfair labor practices by "any persons . . . affecting commerce". By this language "Congress . . . vest[ed] in the Board the fullest *jurisdictional* breadth permissible under the Commerce Clause" — the power to reach not merely enterprises directly engaged in commerce, but also local businesses dealing with those in commerce and exerting an indirect effect on

it, as long as that effect is more than *de minimis*. *N.L.R.B. v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226-227 (1963) (emphasis supplied). And see *N.L.R.B. v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 944 (C.A. 2, 1971). Moreover, "[t]he Board's statutory jurisdiction does not require any particular volume of business except as it may be limited by the maxim *de minimis*." *N.L.R.B. v. Peyton Fritton Stores, Inc.*, 336 F.2d 769, 770 (C.A. 10, 1964).

When the business activities of an employer have a sufficient impact on interstate commerce to invoke the statutory jurisdiction of the Board, "there cannot be the slightest doubt" that the extent to which the jurisdiction will be exercised is a matter of administrative policy within the Board's discretion. *N.L.R.B. v. Marcus Bros.*, 272 F.2d 253, 254 (C.A. 2, 1959). Accord: *N.L.R.B. v. Chain Service Restaurant Employees, Local 11*, 302 F.2d 167, 173 (C.A. 2, 1962). In carrying out this administrative policy, the Board has established certain jurisdictional standards, expressed as annual dollar volume minimums, to determine under what conditions it will assert jurisdiction in a given industry. With respect to non-retail operations, the Board will assert jurisdiction when such operations have an annual outflow or inflow across state lines exceeding $50,000 whether such outflow or inflow be regarded as direct or indirect. *Siemons Mailing Service*, 122 NLRB 81, 85-86 (1958); *Standard Plumbing and Heating Company*, 185 NLRB 444 (1970). "Indirect outflow" refers to sales of goods or services to users who in turn themselves meet any of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards. *Ibid.*

Based on these standards, the Board properly asserted jurisdiction over the Company in this case. For, at the hearing before the Board the Company

in effect conceded that it met the indirect outflow standard when it stipulated that STI — which the Board properly found to be a single employer with JKS and CHI — had, during the preceding 12-month period performed transportation services valued in excess of $50,000 for Span-Crete Northeast, which in turn, shipped goods valued in excess of $50,-000 directly to customers outside the State of New York. By thus admitting that it met the Board's indirect outflow standard, the Company has acceded to the Board's assertion of jurisdiction and should not now be permitted to avoid the consequences.

The Company attacks (Br. 21) the Board's jurisdiction on the ground that "neither [JKS nor CHI] did business with Span-Crete . . ." This contention wholly fails to provide a reason for denying the Board's jurisdiction. For the Board correctly found that, "JKS, STI and CHI are all together a single employer within the meaning of the Act. . . ." (AI. 24). And, where separate companies constitute a single employer, "the Board may consider the operations of all . . . together" in applying its discretionary commerce standards. *N.L.R.B. v. A.K. Allen Co.*, 252 F.2d 37, 40 (C.A. 2, 1958). Accord: *N.L.R.B. v. Jordan Bus Company*, 380 F.2d 219, 221 (C.A. 10, 1967); *N.L.R.B. v. Spun-Jee Corp.*, 385 F.2d 379, 380 (C.A. 2, 1967); *Sackrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 905 (C.A. 9, 1964), cert. den., 379 U.S. 961.

The Board was clearly correct in finding that STI and Sterritt's trucking operations together possessed sufficient "interrelation of operations, common management, centralized control of labor relations and common ownership" (*Radio & TV Broadcast Technicians Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965)) to constitute a single employer. There is also ample evidence

for the Board's finding that STI in fact "exists only on paper" (AI. 25). Thus, STI was wholly owned by Sterritt, had no employees and performed no active functions, nor is there any showing that STI owned any property or other assets. Indeed, it is plain from the record that STI was not a separate company in anything but a technical sense; for, although separately incorporated, it was linked to JKS (and later CHI) as the nominal repository of the trucking permits which afforded the operating authority. Further, although Span-Crete made payments to it, STI merely funnelled the proceeds to the active operation (*supra*, p. 4). Moreover, the mere fact that Sterritt assumed his role as president of STI when he contracted with Span-Crete for the trucking business does not alter the fact that *all* of the contractual obligations were performed by JKS (and later by CHI). Accordingly, there is no reasonable basis to contend that the Company, having met an indirect outflow standard, was not "in commerce" for jurisdictional purposes. See cases cited, *supra*, p. 19.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY URGING EMPLOYEES TO BYPASS THE UNION, BY BARGAINING DIRECTLY WITH EMPLOYEES AND BY THREATENING EMPLOYEES WITH LOSS OF EMPLOYMENT BECAUSE OF THEIR UNION ACTIVITIES.

As shown in the Statement (*supra*, pp. 6-7), shortly after Sterritt extended recognition to the Union, following the strike, he began a campaign to persuade employees that "a Company union" would provide "a better deal" for employees than would their statutory bargaining representative. Thus, he called a meeting of employees at which he announced that if they abandoned Local 294, he would obtain better terms for insurance

and other terms which "wouldn't cost as much" as the Union-sponsored benefits. Similarly, when Sterritt recalled his employees after the January layoffs, he successfully negotiated a new agreement calling for a .75¢ per hour wage reduction as compared to the Union's contract. In addition, Sterritt told Robert Quick that Quick's union activities were responsible for "putting a lot of people out of work". And in the context in which these words were uttered, it is clear that Sterritt meant that he would deny recall to the seven employees who had insisted on accepting the Union-negotiated Dallas-Mavis payments (*supra*, p. 12).

These statements, made by the Company's owner and directed at employees, constitute unlawful interference, restraint and coercion proscribed by Section 8(a)(1) of the Act. Sterritt's unlawful attempt to persuade employees to form their own Union to obtain improved employment conditions wrongfully induced employees to abandon the Union in the hope of bettering their working conditions. *N.L.R.B. v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 937 (C.A. 2, 1970). See also, *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 686 (1944); *Irving Air Chute v. N.L.R.B.*, 350 F.2d 176, 179-180 (C.A. 2, 1965). Moreover, Sterritt's negotiations with the employees in direct repudiation of the Union bargaining agreement interfered with employee organizational rights since it violated the Company's "negative duty to treat with no other" than the Union. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937). Accord: *Medo Photo Supply v. N.L.R.B., supra*, 321 U.S. 678, 683-684 (1944); *N.L.R.B. v. Master Touch Dental Laboratories, Inc.*, 405 F.2d 80, 83 (C.A. 2, 1968). Finally, Sterritt's statement to Quick that his Union activities had resulted in the loss of jobs, only buttressed the coercive impact of the

refusal to recall the Union activities and was itself coercive. *N.L.R.B. v. Cousins Assn., Inc.*, 283 F.2d 242, 243 (C.A. 2, 1960).

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING SEVEN EMPLOYEES BECAUSE THEY HAD ENGAGED IN PROTECTED UNION ACTIVITY.

Section 7 of the Act guarantees to employees "the right to self-organization, to form, join or assist labor organizations" and to "engage in other concerted activities for the purpose of . . . mutual aid or protection". This is a "fundamental right" (*N.L.R.B. v. Jones & Laughlin Steel Corp., supra*, 301 U.S. at 33 (1937)), and "[t]he lines defining [it] have . . . been painted with broad strokes". *Hugh H. Wilson Corp. v. N.L.R.B.*, 414 F.2d 1345, 1347 (C.A. 3, 1969), cert. denied, 397 U.S. 935. In addition, an employer violates Section 8(a)(3) and (1) of the Act when he retaliates, through discharge or other adverse action, against employees because they attempt to exercise this broadly conceived right to self-organization by joining or supporting a union and acting in concert for their mutual aid and protection.

The strike has long been recognized as among the most important kinds of activity protected by Section 7. *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *N.L.R.B. v. Allis Chalmers Co.*, 388 U.S. 175, 181 (1967). Moreover, a concerted insistance upon the retroactive payment of an increase in wages is tantamount to a collective demand for an improvement in working conditions, and clearly, furthers employee "mutual aid and protection" insulated against reprisal by Section 8(a)(3) and (1)

of the Act. See, *N.L.R.B. v. Washington Aluminum Co., supra*, 370 U.S. at 15-16; *Bob's Casing Crews, Inc. v. N.L.R.B.*, 458 F.2d 1301, 1304 (C.A. 5, 1972). And of course, where employees have already obtained improvements through collective bargaining, employee insistence upon their implementation is in effect an extension of the protected activity giving rise to the bargaining in the first place. *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d 495, 499-500 (C.A. 2, 1967). Accord: *N.L.R.B. v. John Langenbacher Company*, 398 F.2d 459, 463 (C.A. 2, 1968). We now show that the Board properly applied these principles in finding that the Company's discharge of seven of its employees for their protected activity violated Section 8(a)(3) and (1) of the Act.

Unquestionably, the seven discriminatees were conspicuously engaged in protected union activities. First, they participated with other employees in the strike, which moved Sterritt to vow that the strikers "would never work for him again". In addition, the seven isolated themselves from their fellow employees by alone insisting upon their right to receive the payments which they understood had been promised them in negotiations with the Union. There can be no doubt that Company President Sterritt harbored a deep antagonism toward these employees. Thus, when a strike was narrowly averted on May 6, 1973, by the Company's promise ro recognize the Union, President Sterritt branded the strike supporters as "goddamn bums" who were trying "to tell him how to run his business" (*supra*, p. 5). And when the seven discriminatees and others actually struck and established a picket line the following day — in protest of Sterritt's angry decision to send out their loads without them — he promised that strike participants "would never work for him again". (*Supra*, p. 5). Also beyond doubt is Sterritt's hostility to

employees who insisted upon accepting the moneys owed to them as retroactive pay. Thus, he attempted to persuade their leader, Robert Quick, Jr., to decline the money, and to others described the payment as his "own sweat and blood" (*supra*, p. 10). He grudgingly tendered the money and made no attempt to conceal his resentment of the employees who accepted. Finally, Sterritt later removed any question that the seven employees who accepted the money had thereby guaranteed eventual termination by the Company. For during the January 1974 suspension of operations, Sterritt told Quick that Quick would not be put back to work by Sterritt because "I think it's time you and I split Company". Sterritt then explained that "whether you guys know it or not, when you accepted the $160, it was the turning point in the job" (*supra*, p. 11). Similarly, when discriminatee Monteverde returned to request a job with Sterritt after the Company purportedly went out of business, Sterritt assured Monteverde that he would never again work for any Sterritt enterprise (*ibid.*). And as shown above, Sterritt's "future plans" — that is, the removal of the seven who had accepted the checks — were implemented in February when Sterritt recalled all of his employees except the discriminatees. This record overwhelmingly supports the Board's finding that the Company discharged seven employees in violation of Section 8(a)(3) and (1) of the Act.[6]

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[6] The record refutes the Company contention that the employees were not entitled to the retroactive increase because the Company had not formally agreed with the Union to pay his men (Br. 16). For Union witness Robillotto credibly testified that there was an oral agreement to pay (AII. 38). In addition, Sterritt himself unequivocally acknowledged the existence of an agreement when in November he made a written request upon the Union that his promise to pay "remain a verbal understanding" (*supra*, p. 8). On these facts, no basis exists for finding that the employees were without statutory protection in their demand that Sterritt pay them retroactively.

The Company does not vigorously contest the Board's findings as to its unlawful motives for the refusal to recall the Union adherents. Instead, the Company attacks (Br. 25-30) the Board's order on the grounds that (1) the Company had no affirmative duty to recall the discriminatees from layoff because CHI was "a new operation" with the right to hire employees without regard to their employment with JKS, and (2) the discriminatees themselves "refused to apply for jobs" at CHI (Br. pp. 25-30). We will show that both of these contentions should be rejected.

As to the first contention, the Company name change from "JKS" to "CHI" did not create a new operation. Indeed, the contention that the creation of CHI relieves the Company of its statutory duty to its employees extends the anti-Union strategy pursued by the Company since December of 1973. For, as found by the Board, CHI was no more than the *alter ego* of JKS, adopted by the Company to divest itself of the employees whose strong Union adherence and whose insistence on the retroactive pay negotiated on their behalf by the Union was seen by Sterritt as a personal affront (AI. 32). It is well established that the creation of an *alter ego* by a "change in name or in apparent control" will not afford escape from responsibility for unfair labor practices. *Southport Petroleum Co., Inc. v. N.L.R.B.*, 315 U.S. 100, 106 (1942). Accord: *Manley Transfer Company v. N.L.R.B.*, 390 F.2d 777, 781 (C.A. 8, 1968). See also, *N.L.R.B. v. Hopwood Retinning Co., Inc.*, 98 F.2d 97, 100-101 (C.A. 2, 1938); *N.L.R.B. v. Herman Brothers Pet Supply, Inc.*, 325 F.2d 68, 69-70 (C.A. 6, 1963); *N.L.R.B. v. Ozark Hardwood Co.*, 282 F.2d 1, 4-5 (C.A. 8, 1960). In these circumstances, the Company remains subject to the Board's order and is bound by it to remedy the violations of Section 8(a)(3) and (1).

The Board's finding that Sterritt created CHI as a mere *alter ego* and disguised continuance of JKS is firmly supported by all the record evidence. Indeed, the Company acknowledges as much, conceding (Br. 10) that "Sterritt formed Concrete Haulers, Inc., which on about February 1, 1974, reinstituted the James K. Sterritt, Inc. operation with some of the same employees . . ." And, as noted *supra*, the conversion from JKS to CHI was, for all practical purposes, only a change in the name of Sterritt's trucking operation. Thus, after JKS went out of business, CHI assumed all of the assets and customers of JKS (*supra*, p. 14). Thereafter, Sterritt's principle customer, Span-Crete, continued to pay STI — Sterritt's third company — for trucking services performed; STI, which had previously turned these proceeds over to JKS, began making the payments to CHI. Moreover, CHI operated out of JKS's terminal, the phone number remained unchanged, the Company trucks were returned to service after being repainted, Sterritt himself continued as the responsible officer, and, all but the discriminatees of JKS were recalled when CHI began operations (*supra*, pp. 13-14). Furthermore, in addition to conceding the correctness of the Board's findings in this respect, the Company makes no attempt to point to any factor, aside from the change in name, which would support its claim that CHI is a new enterprise which was free to withhold employment from JKS' seven troublesome employees. In these circumstances, no reason exists for rejecting the Board's finding that CHI was no more than the *alter ego* of JKS and that the refusal to recall the Union activitists violated Section 8(a)(3) and (1) of the Act. See *Manley Transfer Company v. N.L.R.B.*, *supra*, 390 F.2d at 781.

As to the Company's second contention, that the discriminatees knew in advance of the opening of CHI, and, in protest of the Company's repudiation of the Union's contract, "refused to apply for jobs" (Br. 29), the Board found that Sterritt "deliberately chose not to put the [discriminatees] back to work" (AI. 36). The record supports for the Board's determination.

First, it is clear that Sterritt concealed his plans from the seven union supporters. Indeed, long after making the decision to create CHI, Sterritt continued to assure the discriminatees that he had in fact completely ceased doing business for Span-Crete. Thus, in December Sterritt assured Span-Crete that "organizational changes" were in the works and prepared to incorporate CHI as a replacement for JKS. However, he made no mention of CHI in his notice to employees that JKS was "going out of business". Nor did he mention CHI to truckdriver Quick when Quick subsequently offered to find work for one of the JKS trucks. And when driver Monteverde asked Sterritt for an employment application, on the assumption that business would be resumed sooner or later, Sterritt assured Monteverde that he had no such plans. Again, Sterritt told Quick that he "didn't know and didn't care" who would be hauling for Span-Crete in the future; and even in late January, after CHI had accepted applications from the other drivers, Sterritt insisted to discriminatee Ruhnke that he still "didn't know and didn't care" who would be handling Span-Crete's business. (*supra*, pp. 11-13). Finally, in February, Sterritt, still attempting to keep the discriminatees in the dark, resumed operations without informing any of the seven or the Union.

Second, when the employees finally did learn of the changeover, their efforts to return to work were bluntly rebuffed by Sterritt. Thus, on March 9 the employees met with the Union and Sterritt's

remaining work force and attempted to restore each of the discriminatees to his rightful seniority. However, when the laid off employees sought to discuss reinstatement with Sterritt at the terminal later the same day, they were locked out by Sterritt, who refused to leave the terminal to talk to the men or even discuss it on the telephone. There is thus no support for the Company contention that the discriminatees knew of Sterritt's decision to create CHI and refused to return to work. On these facts, the Company's argument that the employees are not entitled to reinstatement should be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's order should be enforced in full.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES K. STERRITT, INC. & CONCRETE HAULERS, INC., Petitioner,	)	
v.	)	Nos. 75-4011 75-4044
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.
this 16th day of July, 1975.